

**ANNUAL REPORT
OF THE
ENVIRONMENTAL CRIMES TASK FORCE**



**Indiana Legislative Services Agency
200 W. Washington Street, Suite 301
Indianapolis, Indiana 46204**

September, 2007

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ENVIRONMENTAL CRIMES TASK FORCE

Membership Roster

Senators

Jeff Drozda, Chairperson
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John Broden
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Ryan Dvorak
South Bend

Timothy Neese
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Art Harris
Indianapolis

Jeff Miller
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Sue Shadley
Indianapolis

Mayor Shannon Buskirk
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Carol McDowell
Elkhart

Gordon Durnil
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Tom Easterly
Indianapolis

Tobias Buck
Pierceton

Mark Stuaan
Indianapolis

Mayor John Zumer
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Jim Flennerly
East Chicago

John Land
Logansport

Stephen Johnson
Indianapolis

Robert Carter
Indianapolis

Staff

Robert Bond
Attorney for the Task Force
Andrew Hedges
Attorney for the Task Force
Bernadette Bartlett
Fiscal Analyst for the Task Force

A copy of this report is available on the Internet. Reports, minutes, and notices are organized by committee. This report and other documents for this Committee can be accessed from the General Assembly Homepage at <http://www.in.gov/legislative/>.

I. STATUTORY DIRECTIVE

The Indiana General Assembly enacted legislation (P.L.63-2005) directing the task force to do the following:

- (1) Conduct studies necessary to prepare a final report that includes at least the following:
 - (A) A summary of environmental crime statutes of other states.
 - (B) A summary of requirements of federal environmental programs delegated to states.
 - (C) A summary of federal criminal sentencing guidelines.
 - (D) Recommendations about which environmental law violations should be a misdemeanor, a Class D felony, or a felony of another class.
 - (E) If determined appropriate by the task force, recommendations for legislation, including a set of specific statutory standards for determining criminal violations.
- (2) Consider in its studies the full range of issues dealing with environmental law.

II. INTRODUCTION AND REASONS FOR STUDY

Until July 1, 2007, Indiana's environmental crime statute was IC 13-30-6-1, which provided:

- (a) A person who intentionally, knowingly, or recklessly violates:
 - (1) environmental management laws;
 - (2) air pollution control laws;
 - (3) water pollution control laws;
 - (4) a rule or standard adopted by one (1) of the boards; or
 - (5) a determination, a permit, or an order made or issued by the commissioner under environmental management laws or IC 13-7 (before its repeal);
- commits a Class D felony.

Because this statute incorporates by reference numerous other statutes and rules, it may be unconstitutional under the void-for-vagueness principles described in *Healthscript, Inc. v. State*, 770 N.E.2d 810 (Ind. 2002). In addition, the statute's broadness creates certain other difficulties: (1) it does not distinguish between minor violations and more serious violations; (2) it is difficult to determine whether a person is in compliance with the statute; and (3) because a prosecution under the statute requires knowledge of many other environmental statutes and rules, prosecuting attorneys are often reluctant to bring a prosecution in an environmental case.

The task force undertook its study with the goal of creating a new environmental crimes statute for Indiana.

III. SUMMARY OF WORK PROGRAM

The task force met five times during the 2006 interim session on April 27, June 22, August 24, October 12, and November 17. The task force met once during the 2007 interim session on September 11.

April 27, 2006.

Senator Kenley opened the meeting by noting that Indiana currently has only one sanction to deal with environmental crimes and there is no difference in degree of penalty imposed. Indiana needs more specific sanctions in order to enforce, prosecute, or fine offenders. Sen. Kenley stated that a new environmental crimes statute would need to answer three key questions:

Who should have prosecuting authority?
What acts should rise to the level of a crime?
What should the penalties for those crimes be?

A. Who should have prosecuting authority?

Stephen Johnson summarized the advantages and disadvantages of the current Indiana practice of relying primarily on county prosecutors to prosecute environmental crimes. County prosecutors are familiar with local court requirements. Having a prosecutor at the state level specializing in environmental crimes might lead to a tendency to overzealous enforcement. However, it would be helpful to have authority to allow state officials provide support for county prosecutors. Also, the question of crimes with multi-county environmental impacts needs to be addressed. Several members liked the method used by Ohio where county prosecutors have jurisdiction over acts in their counties but the state environmental agency can also refer cases to the county prosecutor.

B. What acts should rise to the level of a crime?

Sue Shadley observed that the primary impact of an environmental crime is the threat of prison; civil violations already carry the possibility of substantial fines. Therefore, only significantly harmful actions should be crimes. There is no need in Indiana to have environmental misdemeanors. She said that some acts in each medium (air, water, land) should be a crime.

Jim Flannery also thought the focus should be on acts that cause significant harm to the environment or human health to deter local prosecutors from trying to make a name for themselves by going after businesses for less egregious offenses that can be punished adequately in civil court.

Rep. Dvorak said the task force needed to establish working definitions of specific crimes.

Tom Easterly approved of the federal practice of holding the top executive of a company responsible for the actions of employees and absolving lower level employees of responsibility as long as they acted with the authorization of their supervisors. He also said that there needed to be a criminal sanction for violators who ignore repeated civil judgments against them.

Sen. Kenley raised the question of prohibitions against companies with a history of repeated violations. Sue Shadley mentioned Indiana's good character law, which applies to solid waste companies in some permitting situations.

C. What criminal penalty is appropriate

The task force elected to defer the discussion of appropriate penalties until the specific criminal acts were defined.

D. Environmental crimes in other states

Staff distributed and described certain environmental crimes statutes from other states. The task force agreed that Illinois provided a good model to focus the discussion at the next meeting. Members liked the provisions to prevent unjust enrichment. Sue Shadley disagreed with Illinois' inclusion of misdemeanor crimes.

June 22, 2006.

Mark Stuaan made a report describing the application of the federal sentencing guidelines to federal criminal prosecutions.

Staff attorney Andrew Hedges distributed a preliminary draft of an environmental crime bill based on the task force's previous discussions, noting that the draft used the Illinois environmental crimes statute as a model but broadened the focus based on what other certain other states have done. The draft incorporated comments from Sue Shadley and IDEM.

In this draft, knowing or intentional unlawful acts that result in a discharge to the environment and cause harm or the risk of harm are generally Class D felonies, while unlawful acts that do not result in a discharge are Class A misdemeanors. Tampering with drinking water systems with the intent to cause bodily injury would be a separate crime punishable as a Class B or Class A felony.

The task force suggesting revising the draft to:
(1) clarify the liability of corporate officers;

- (2) prohibit unjust enrichment;
- (3) increase the penalty for certain intentional misstatements to a felony; and
- (4) remove criminal penalties for rules violations.

The task force also discussed other issues related to the draft, including the appropriate *mens rea*, increased penalties for recidivist offenders, the requirement of showing harm in an environmental case, burden sharing between the county prosecutor and the attorney general, and certain regulations that relate to confined animal feeding operations.

August 24, 2006.

Stephen Johnson distributed a summary entitled "Corporate Criminal Responsibility for Environmental Crimes" and explained the current law that allows under certain circumstances the prosecution of: (1) corporations and other non-individuals; and (2) the officers of those entities. The members discussed the extent to which an environmental crimes statute should specify the standards for finding a business entity or an officer criminally liable. Staff attorney Andrew Hedges described a new draft of an environmental crimes bill prepared that incorporated the task force's previous discussion. The members discussed in detail the revised environmental crimes draft.

October 12, 2006.

Sen. Kenley began the meeting with comments on changes made to the environmental crimes bill draft since the last meeting of the task force. He explained the reasons for criminalizing reckless violations in addition to knowing and intentional violations, for the "damage to the environment" standard, and for the unjust enrichment provisions.

Patrick Bennett, Indiana Manufacturers Association, praised the progress made in the draft, indicating that the draft strikes an appropriate balance by stating the requisite mental state, the nature of the prohibited act, the nature of the damage caused, and the defense of lack of knowledge.

Chips Everhart, Rose Acre Farms, expressed support for the overall concept embodied in the draft and concern that certain provisions might be overly restrictive. He would like the new law to preserve a certain amount of flexibility.

Janet McCabe, Improving Kids' Environment, questioned whether: (1) the criminal standard of damage to the environment contained in the draft is specific enough; (2) a court should be required (instead of permitted) to consider any improper economic benefit received by the defendant in determining the amount of a criminal fine; (3) a violation includes both a prohibited act and a failure to perform a required act; (4) IDEM has adequate authority under the draft to deal with violators of commissioner's orders and agreed orders; (5) the definition of wetlands should include all wetlands instead of state regulated wetlands; and (6) wetlands mitigation should have any bearing on a wetlands

prosecution.

Several members discussed whether it is appropriate to criminalize violations of state administrative rules. Tom Easterly believes that certain rule violations merit criminal penalties, and that it is not practical to address all of those violations in statutes. Stephen Johnson noted that the task force was formed in part to recommend a change to the current law that criminalizes rule violations.

November 17, 2006.

Staff attorney Andrew Hedges explained the following differences between the bill draft considered at the last meeting and a new draft. The main differences between the drafts are: (1) the new draft requires causing harm, not just the risk of harm; (2) a violation must proximately cause the harm; (3) in sentencing, a court must consider any improper economic benefit that accrued to the defendant as the result of a violation; the wetlands portion of the statute will only apply to state regulated wetlands; and (4) harm to animals only includes harm to vertebrate animals.

Following an extensive discussion of the draft, Sen. Kenley expressed his desire to introduce a bill in the next session of the General Assembly.

September 11, 2007.

Staff attorney Andrew Hedges made a presentation concerning SB 286. Sen. Kenley introduced the environmental crimes draft prepared by the task force as SB 286 during the 2007 legislative session. SB 286 passed both houses in an amended form and was signed into law by the Governor. The primary differences between the version of the bill prepared by the task force and the version that passed into law are as follows:

- (1) Instead of using a cross reference to the criminal code to describe the responsibility of certain corporate officers, the final version of the bill included text mirroring the language in the criminal code in the environmental crimes chapter.
- (2) The final version contained an exception for certain discharges that are the result of a combined sewer overflow, if IDEM is notified in a timely manner.
- (3) The penalty for certain environmental crimes was raised from a Class D felony to a Class C felony if the crime results in death.
- (4) The penalty for making certain material misstatements was raised from a Class A misdemeanor to a Class D felony.
- (5) The penalty for dumping refuse on or near certain waters was raised from a Class B infraction to a Class A infraction, and the minimum fine was set at \$1,000.

Rep. Dvorak explained some of the changes made during the legislative process in greater detail, and several task force members asked Tom Easterly whether the bill was working as intended. Mr. Easterly stated that although preliminary reactions to the new law have been

favorable, it is still too early to know how well the bill was working. Sen. Drozda suggested that the task force recommend that IDEM make a report to the Legislative Council by July 1, 2008 concerning the effectiveness of SB 286 in enforcing environmental laws.

The task force adopted the final report, as amended, 10-0.

IV. COMMITTEE FINDINGS AND RECOMMENDATIONS

The task force did not make findings of fact.

The task force recommends that the Indiana Department of Environmental Management report to the Legislative Council before July 1, 2008 concerning the effectiveness of SB 286 in enforcing environmental crimes.

Draft language considered by the task force during its 2006 meetings was introduced by Sen. Kenley as SB 286. SB 286 passed both houses in an amended form, was signed by the Governor, and became effective on July 1, 2007.

WITNESS LIST

Patrick Bennett, Indiana Manufacturers Association
Chips Everhart, Rose Acre Farms
Joe Miller, Rose Acre Farms
Janet McCabe, Improving Kids' Environment
Roger Goldman, Indiana Department of Natural Resources
Justin Schneider, Indiana Farm Bureau
Vince Griffin, Indiana Chamber of Commerce
Bill Wagner, Sommer Barnard
Lee Botts
Nelson Becker
Brian Wright, Hoosier Environmental Council
Elisha Modisett, Indiana Department of Agriculture